

# DECISION



14171  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-196029.2

DATE: June 30, 1980

MATTER OF: Lamson Division of Diebold,  
Incorporated

## DIGEST:

Contractor advised contracting agency almost immediately after award that it would be unable to perform contract as awarded. Issuance of change order to accept contractor's value engineering change proposal, which in part relaxed specifications, for purpose of permitting performance by such firm had effect of distorting competition on which award was based, and thus was improper.

Lamson Division of Diebold, Incorporated (Lamson) protests the General Services Administration's (GSA) modification of Contract No. GS-03B-78341 with Mosler Safe Company (Mosler) for a material handling system for the Social Security Administration (SSA) Headquarters. Lamson contends that the modification compromised the competition upon which the award had been based. We agree.

## Facts

The solicitation for the requirement was issued on April 9, 1979. The specifications described a mail tray delivery system in which conveyor belts would move trays at a specified speed horizontally and vertically within the SSA Headquarters complex. Each of the mail trays was to be of prescribed dimensions, thickness, and configuration, and have a capacity of 60 pounds.

A base bid which included the delivery system, installation and 22 mail tray carts, a bid to supply 66 additional mail tray carts, and a bid for adjustment and maintenance were invited. Bids were opened on May 31,

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[Protest INVOLVING Contract Modification]

with the low total bid (base plus alternates) being submitted by Mosler in the amount of \$1,162,150. Lamson bid \$1,340,477. The contract was awarded to Mosler on June 26, at which time Mosler was requested to execute and return a copy of the contract, and performance and payment bonds.

Before the contract and bonds were returned to GSA, Mosler advised the contracting officer that its equipment supplier had sold its conveyor system product line and declared bankruptcy, and that it therefore was unable to fulfill the Government's need within the necessary time period. In addition, Mosler submitted a value engineering change proposal (VECP) pursuant to the contract's Value Engineering Incentive Clause, in which the firm offered a substitute system for the one solicited, at a lower price. That clause permits the submission for possible approval by the contracting officer of "any cost reduction proposal \* \* \* initiated and developed by the Contractor for the purpose of changing any requirement of this contract" without impairing the requirement's "functions and characteristics." However, the contracting officer advised Mosler on August 1 that the Government's acceptance of the firm's bid consummated a binding contract; that the contract would be terminated for default if payment and performance bonds were not submitted promptly; and that Mosler's VECP would not be reviewed until that submission. The bonds and the executed contract were furnished on August 10, and a notice to proceed was issued with the contract completion date set as August 26, 1980.

Mosler's VECP was then reviewed in detail. It offered a "telelift" system in which removable electric cars traveled vertically and horizontally on fixed tracks (in contrast to the specified stationary trays on moving belts). In addition, the cars were smaller than the trays specified and had a capacity of only 20 pounds each. As we understand it, the "telelift" system is a proprietary product of Mosler's.

SSA however, in response to a request by the contracting officer that it verify its requirement, stated

that the smaller vehicles would meet its needs, as would the 20-pound capacity as long as the system could move the same volume of materials as contemplated in the solicitation. In view thereof, on October 6 the contracting officer issued a change order to Mosler's contract to incorporate the VECP at a savings to the Government of not less than \$175,018 from the contract price.

Protest and GSA response

Lamson protests that GSA's acceptance of Mosler's VECP in this instance reflected an improper relaxation of the specifications under which bids were solicited. Lamson argues that GSA's action, "with full knowledge and complete understanding that what they had contracted for could not be provided" by Mosler, thus seriously compromised the otherwise competitive nature of the procurement that resulted in the purchase. In this respect, Lamson asserts that SSA originally had specifically rejected the telelift system as a means to meet its material handling requirements. Lamson believes that award should have been made to the low bidder which was able to supply the system specified in the solicitation.

In response, GSA cites our decision in American Air Filter Company, Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD 136, for the following test to determine whether a modification properly was "within the general scope of the contract:"

"\* \* \* whether the original purpose or nature of the contract has been so substantially changed by the modification that the contract for which competition was held and the contract to be performed are essentially different."

GSA argues that although the solicited and telelift systems differed in method of operation, they both fulfilled the same purpose, i.e., the horizontal and vertical transportation of material throughout the SSA building. GSA argues:

"Since the function of the Mosler telelift system does not differ from the function of the system required by the initial specifications, we conclude that the original nature and purpose of the contract was not changed by the modification."

### Discussion

Initially, we point out that a protest concerning a contract modification or acceptance of a VECP ordinarily is not for resolution under our bid protest function since it involves contract administration, a matter within the authority of the contracting agency. Symbolic Displays, Incorporated, B-182847, May 6, 1975, 75-1 CPD 278. However, our Office will review such a protest when it is alleged, as here, that the scope of the contract was exceeded. In this respect, while we have recognized the necessity for modifications and the efficacy of the VECP procedure in general, see 50 Comp. Gen. 540 (1971), we also have consistently stated that the integrity of the competitive procurement system dictates that contracting parties may not employ changes in the terms of a contract, whether by VECP or other modification, that have the effect of circumventing the competitive procurement statutes. Die Mesh Corporation, B-190421, July 14, 1978, 78-2 CPD 36; E. R. Hitchcock & Associates, B-182650, March 5, 1975, 75-1 CPD 133.

In our view, that principle has been violated here. Notwithstanding GSA's position, the notice to proceed was issued to Mosler by the contracting officer with knowledge of the severe difficulty if not impossibility to supply a system in accordance with the firm's obligation under the contract as awarded. Under the circumstances, we believe that the issuance of the change order almost immediately after contract award to accept a VECP submitted by a contractor who otherwise simply was not in a position to perform, and including specification changes that were at least arguably significant, effectively distorted the competition on which the award of the contract was based. E.R. Hitchcock & Associates, supra.

The protest is sustained.

However, there is no practical remedial action that our Office could recommend at this time which we would consider to be in the best interest of the Government, since GSA has advised that the installation essentially has been completed. Nevertheless, by letter of today we are bringing the matter to the attention of the Administrator of GSA.

*Milton J. Fowler*

Acting Comptroller General  
of the United States